

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCUS ANTONIO JONES,)	
)	
Plaintiff,)	
)	
v.)	CASE NO. 1:05-cv-200-WKW
)	(WO)
BILLY MITCHEM, <i>et al.</i> ,)	
)	
Defendants.)	

ORDER

This case is now before the court on the plaintiff's Notice of Appeal, construed as a Motion for Certificate of Appealability (Doc. # 29) and Motion for Leave to Appeal In Forma Pauperis (Doc. # 29), both filed on November 6, 2006.

Title 28 U.S.C. § 1915(a)(3) provides that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." In making this determination as to good faith, a court must use an objective standard, such as whether the appeal is "frivolous." *Coppedge v. United States*, 369 U.S. 438, 445 (1962).¹ "The statute provides that a court 'may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or

¹ See 28 U.S.C. § 1915(e):

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be

granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

malicious.” *Attwood v. Singletary*, 105 F.3d 610, 613 (11th Cir. 1997) (citing 28 U.S.C. § 1915(d) (1996)).

This circuit has defined a frivolous appeal under section 1915(d) as being one “‘without arguable merit.’” *Harris v. Menendez*, 817 F.2d 737, 739 (11th Cir.1987)(quoting *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir.1976)). “‘Arguable means capable of being convincingly argued.’” *Moreland v. Wharton*, 899 F.2d 1168, 1170 (11th Cir.1990) (per curiam) (quoting *Menendez*, 817 F.2d at 740 n.5); see *Clark*, 915 F.2d at 639 (“A lawsuit [under section 1915(d)] is frivolous if the ‘plaintiff’s realistic chances of ultimate success are slight.’” (quoting *Moreland*, 899 F.2d at 1170)).

Sun v. Forrester, 939 F.2d 924, 925 (11th Cir. 1991), *reh'g denied*, 503 U.S. 999 (1992). See also *Weeks v. Jones*, 100 F.3d 124, 127 (11th Cir. 1996) (stating that “[f]actual allegations are frivolous for purpose of [28 U.S.C.] § 1915(d) when they are ‘clearly baseless;’ legal theories are frivolous when they are ‘indisputably meritless.’”) (citations omitted).

Applying the foregoing standard, this court is of the opinion that the plaintiff’s appeal is without a legal or factual basis and, accordingly, is frivolous and not taken in good faith.

Accordingly, it is ORDERED that the plaintiff’s motion to proceed on appeal *in forma pauperis* is hereby DENIED, and that the appeal in this case is hereby certified, pursuant to 28 U.S.C. § 1915(a), as not taken in good faith. It is further ORDERED, therefore, that the motion for certificate of appealability is also DENIED.

DONE this 12th day of December, 2006.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE